the depositor. It would seem, too, that, in view of the contract to sell without encumbrances, the payment did not in fact disturb the defendant's affairs. Hence, recovery would be legitimate within the broader principle submitted. The plaintiff, however, is barred by another rule, which is undisputed,—that a subrogee acquires no remedies different from those which might have been enforced by the party to whose place he succeeds.[16] The plaintiff sought a personal money judgment. But the defendant was never subject to any personal liability to the city, because the arrears, being for local street improvement assessments, created only a charge upon the land.[17] Subrogation was therefore rightly denied.

STATE POLICE POWER UNDER THE COMMERCE CLAUSE.—In order to determine whether a particular aspect of interstate commerce is within the exclusive power of Congress, or is subject to the police power of the State, in the absence of conflicting congressional legislation, the rule is sometimes laid down that the State cannot interfere with commerce itself, i. e., intercourse, or the passing back and forth among the several States.[1] As a matter of practice, this is not strictly true. Thus, it has been held that the state may, in the exercise of its police power, delay,[2] or temporarily obstruct intercourse,[3] e. g., by prohibiting the running of trains on Sunday.[4] So the introduction of articles not fit subjects of commerce may be prohibited; but here the exception is more apparent than real, since the transportation of such articles is not commerce at all.[5] Conversely, it is said that the state may regulate the incidents or agents of commerce.[6] This rule cannot be consistently applied,[7] and overlooks the intimate connection between commerce and its instruments. The distinction is also drawn between legislation directly and indirectly affecting interstate commerce.[8] If the terms are used to indicate, on the one hand, legislation directly aimed at commerce in the narrow sense of intercourse, and, on the other, legislation aimed at the instrumentality, and consequentially affecting commerce itself, the test does not hold.[4] If the distinction is based upon causal relationship,[9] it may be answered that most regulations of the instrument by direct cause affect commerce itself.[7] It is believed that the cases professedly conforming to this distinction make degree of effect, rather than causal connection, the guide.[10] The line drawn in *Cooley* v.

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[16]Houston *v.* Br. Bk. (1854) 25 Ala. 250; Winslow *v.* Otis (1855) 5 Gray 360; Swarts *v.* Siegel (1902) 117 Fed. 13; *In re* Johnson (1880) L. R. 15 Ch. D. 548.

[17]Matter of Hun (1895) 144 N. Y. 472.

[1]Hannibal etc. R.R. Co. *v.* Husen (1877) 95 U. S. 465; Co. of Mobile *v.* Kimball (1880) 102 U. S. 691, 702.

[2]Erb *v.* Morasch (1899) 177 U. S. 584.

[3]Lake Shore etc. Ry. Co. *v.* Ohio (1898) 173 U. S. 285.

[4]Hennington *v.* Georgia (1895) 163 U. S. 299.

[5]Bowman *v.* Chicago etc. Ry. Co. (1888) 125 U. S. 465.

[6]Chicago etc. Ry. Co. *v.* Solan (1898) 169 U. S. 133.

[7]Cf. Hall *v.* De Cuir (1877) 95 U. S. 485, with Louisville etc. Ry. Co. *v.* Mississippi (1889) 133 U. S. 587.

[8]Sherlock *v.* Alling (1876) 93 U. S. 99; Smith *v.* Alabama (1888) 124 U. S. 465.

[9]Central etc. Ry. Co. *v.* Murphey (1905) 196 U. S. 194.

[10]Cf. Harlan, J., in Hennington *v.* Georgia, *supra*, 317, 318, and in Lake Shore etc. Ry. Co. *v.* Ohio, *supra*, 298 (using these terms synonymously).

Port Wardens[11] between subjects national in character, requiring uniform regulation, and matters permitting of local legislation, is more satisfactory than any other thus far suggested, both in theory and comparative ease of application. But even this test as stated is incomplete. State legislation has been declared unconstitutional though uniformity was not necessary under the circumstances.[12] Yet, to the extent that legislation upon matters necessarily requiring uniformity is unconstitutional, the rule of the Cooley case seems well established.[13] In all probability, the infinite variety of the subjects of commerce will always preclude the adoption of a hard and fast rule of classification. Furthermore, in view of the continual readjustment of commercial conditions, it is extremely doubtful whether such a rule would in fact be desirable. The real end of the courts seems to be to secure a just balance between freedom of commerce and the needs of the country as a whole on the one hand, and the needs of particular localities on the other.[14] In one case at least, the Supreme Court has gone to the extent of declaring the reasonableness of the legislation the true criterion.[15]

Judged by any of these standards, a Missouri Statute, to take effect June 14, 1907, regulating the hours of service of train dispatchers and telegraph operators, was clearly within the police power of the State, aside from the question of its validity under the Fourteenth Amendment. But the Supreme Court of the State declared the statute ineffective *ab initio* because Congress had previously passed a similar but less stringent, law to take effect March 4, 1908. *State* v. *Mo. Pac. Ry. Co.* (Mo. 1908) 111 S. W. 500. The proposition that the bare enactment of a statute by Congress, irrespective of the date of its taking effect, prevents the operation of conflicting State laws, is unfounded both in precedent and on sound principle. Nor does the comparative stringency of the two measures, under the circumstances, seem material. Furthermore, the court's notions of comity should not override the express will of the legislature in a matter within the latter's discretionary power.

Undoubtedly, had Congress expressed its will that, in the meantime, the field be unrestricted by State legislation, the State law would have been inoperative from the beginning, as it was from March 4, 1908, both because of the nature of the constitutional grant of power to Congress, and the express provision that the laws of Congress shall be supreme.[16] Though no Supreme Court case has been found in which an act of the State in the exercise of the police power, in the narrower sense of protection of health, safety and morals, has been declared superseded, dicta indicate that such would be the result.[17] The exact effect of congressional legislation upon the police power of the State has not been fully explained by the Supreme Court. It might be argued that the police power recedes when Congress takes the field—not, of course, because Congress may deprive the

[11](1851) 12 How. 310.

[12]Cleveland etc. Ry. Co. *v.* Illinois (1899) 177 U. S. 514.

[13]See Prentice, Commerce Clause, 28.

[14]W. U. Tel. Co. *v.* Pendleton (1887) 122 U. S. 347; W. U. Tel. Co. *v.* James (1896) 162 U. S. 650.

[15]Cleveland etc. Ry. Co. *v.* Illinois, *supra*. And see Lake Shore etc. R.R. Co. *v.* Ohio, *supra*.

[16]U. S. Const., Art. VI, par. 2.

[17]Hennington *v.* Georgia, *supra*; Lake Shore etc. R.R. Co. *v.* Ohio, *supra*.

State of any portion of its police power—but because the power reserved by the State might be said to be reserved subject to diminution when Congress steps in. And, in one case, the State act is spoken of as "annulled."[18] But the language generally used indicates that the police power is undiminished, though its operation upon subjects of commerce is obstructed. On this latter theory, State legislation is merely suspended, and an act passed during the life of a law of Congress is not void, but becomes operative when Congress repeals its law. The question has not been squarely presented to the Supreme Court, but such is the view of the State courts.[19] And it receives support from the position taken by the Supreme Court with reference to the Wilson Act of 1890 in the case of *In re Rahrer*,[20] although that case does not necessarily decide anything further than that Congress may declare that interstate commerce in a certain article ceases when the article reaches the importer's hands—perhaps on the same principle that it may, when reasonable, declare an article of doubtful character an unfit subject of commerce—and that sales by the importer come within the terms of the general law prohibiting intrastate sales. A result similar to that in the New York cases above cited[19] has been reached in the case of bankruptcy legislation, analogous since the passage of such laws by a State may be regarded as an exercise of its police power under the now accepted definition of the term.[21]

HARDSHIP AS A DEFENSE TO SPECIFIC PERFORMANCE.—Those cases in which equity uses its "discretionary power" to refuse specific enforcement of a contract, which do not fall under the regular categories of fraud, mistake, etc., are collected by text writers under the general statement "that equity will not specifically enforce a contract that will inflict hardship on the defendant."[1] But the cases cited lend only partial support to this proposition; for, on the one hand, some kinds of hardship do not bar relief, as, for example, the defendant's insolvency,[2] or his loss of all benefit from the contract,[3] and, on the other hand, many cases of so-called "hardship" involve no hardship at all in the ordinary sense.[4] An examination of the cases shows that they really establish the narrower and more definite principle that equity will not enforce an unequal contract—one in which the detriment to the defendant is much greater than his benefit. The modern rule that inadequacy of consideration, i. e., inequality of market values, does not prevent enforcement[5] is only an apparent exception to this principle, for since the value of the consideration to the parties depends

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[18]*Per* Matthews, J., in Smith *v.* Alabama, *supra.*

[19]Sturgis *v.* Stofford (1871) 45 N. Y. 446; Henderson *v.* Stofford (1874) 59 N. Y. 131.

[20](1890) 140 U. S. 545. See Prentice, Commerce Clause, 142.

[21]Tua *v.* Carriere (1885) 117 U. S. 201, 209; Butler *v.* Goreley (1892) 146 U. S. 303, 314.

[1]Story, Eq. (13th Ed.) 90; Pom. Spec. Perf. (2nd Ed.) 9; Fry, Spec. Perf. (3rd Am. Ed.) 193.

[2]Parker *v.* Garrison (1871) 61 Ill. 250.

[3]See Adams *v.* Weare (1784) 1 Bro. Ch. 567.

[4]See City of London *v.* Nash, *infra.*

[5]See Seymour *v.* Delaney (N. Y. 1822) 6 Johns. Ch. 222, rev. 3 Cow. 445, 531, 534. But see Columbus etc. Ry. Co. *v.* Ohio Southern Ry. Co. (1885) 1 Oh. Cir. Ct. 275, at 280; Bates Machine Co. *v.* Bates (1898) 87 Ill. App. 225, 236.